Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

No. 90-1129

In the Supreme Court of the United States

OCTOBER TERM, 1990

SUMITOMO TRUST & BANKING CO. (U.S.A.),
PETITIONER

v.

HANNON ARMSTRONG & COMPANY,
formerly known as EDEN HANNON & COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly awarded a constructive trust remedy for petitioner's breach of the "Nondisclosure and Noncircumvention Agreement" at issue in this case, after the district court mistakenly concluded that such a remedy was available only for misappropriation of trade secrets.

2. Whether the district court and the court of appeals properly found that petitioner breached the Nondisclosure and Noncircumvention Agreement and that petitioner's efforts to explain away its misconduct "defie[d] logic and common sense" and were simply "not true."

3. Whether the court of appeals properly denied petitioner's request to certify a question to the Supreme Court of Virginia, when the request was not made until after the court of appeals ruled against petitioner, and when the Supreme Court of Virginia has already described the scope of an equity court's remedial authority under Virginia law.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, respondent Hannon Armstrong & Company states that it has no parent or subsidiaries.

At the time of trial in this case, respondent was known as Eden Hannon & Company. The name of the corporation was changed to Hannon Armstrong & Company on September 4, 1990, through a filing approved by the Virginia Corporation Commission.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Hannon Armstrong & Company, formerly known as Eden Hannon & Company ("Eden Hannon"), submits this brief in response to the Court's request for a response to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Although the petition attempts to obscure the point, this case arose from flagrant and deliberate wrongdoing by petitioner Sumitomo Trust & Banking Co. (U.S.A.). Sumitomo approached Eden Hannon and offered to lend it money in connection with upcoming Eden Hannon bids in a Xerox lease financing program known as the Partnership Asset Strategy ("PAS") Program. As part of its effort to solicit Eden Hannon as a loan customer, Sumitomo signed a Nondisclosure and Noncircumvention Agreement, promising not to use Eden Hannon's confi-

dential information and not to independently pursue lease transactions with Xerox in the PAS Program. On the strength of that agreement, Eden Hannon gave Sumitomo access to its stock in trade--its highly confidential model for preparing bids in the Xerox program and detailed information about the content of past bidding. Sumitomo then immediately broke its promise and undertook efforts to go behind Eden Hannon's back and solicit Xerox's business directly. Soon after pledging not to "independently pursue" a transaction in the Xerox PAS Program, Sumitomo secretly bid against Eden Hannon for the December 1988 portfolio of copying machines offered by Xerox. Sumitomo succeeded in winning the contract and has received more than $5 million in income on the transaction during the past two years alone. Eden Hannon brought this lawsuit to seek redress for its betrayal by Sumitomo.

Naturally, petitioner is not eager to reveal the details of this sordid escapade. Nor does petitioner wish to acknowledge that, despite the overwhelming evidence of its liability, it stubbornly resisted, both in the district court and on its cross-appeal to the Fourth Circuit, the obvious conclusion that it had breached its agreement with Eden Hannon. Petitioner's sterile recitation of the background of this dispute, offered without benefit of citations to the record, provides only the palest of pictures of the underlying facts and of the grounds for the decision below. Accordingly, we review the facts in some detail.

A. Eden Hannon's Successful Participation in the Xerox PAS Program

Four times a year, Xerox invites selected investors to bid competitively on one or more "portfolios" of hundreds of copying machines that Xerox has manufactured and leased to customers. Pet. App. 4a. Xerox asks each investor to state what it will pay for the right to receive the stream of lease revenues generated by the copiers in the portfolio, together with the residual value of the cop-

iers when the leases expire or are terminated. *Id.* Through the PAS Program, Xerox converts its leases into immediate cash and transfers to the successful bidder the risks of ownership over the lifetime of the leases. The successful bidder, in turn, profits to the extent that the income it receives from the stream of lease revenues and the eventual resale of the copiers to Xerox exceeds what it paid for the portfolio.

With its invitation for bids on a quarterly portfolio, Xerox provides investors with a book of information about the equipment and leases included in the portfolio. *See, e.g.*, A. 1287-1300 (PX9).[1] Xerox requires the bids that it invites to contain several components, not just a single-figure proposed purchase price. Pet. App. 4a. Because of the complexity of the PAS Program transactions and the detailed bids that Xerox demands, preparation of a competitive bid is a complicated process that requires close analysis of the information provided by Xerox and evaluation of many sophisticated economic and technological variables (including the reliability of the Xerox copiers and the creditworthiness of Xerox's customers).

Eden Hannon has enjoyed major success with its bids for the quarterly portfolios offered in the PAS Program. During the first three and a half years of the Program, Eden Hannon submitted a successful bid or bids in ten of the quarterly bidding competitions. Pet. App. 4a. To perform its economic analyses and prepare its bids, Eden Hannon developed its own computer model at a cost of more than $150,000. A. 175-76. This model, along with the experience of Eden Hannon's financial personnel, has enabled Eden Hannon to compete successfully for the Xerox contracts.

To acquire the Xerox portfolios, Eden Hannon borrows funds from a variety of lenders. Lenders finance the en-

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[1] "A." refers to the parties' appendix in the court of appeals. A copy of this appendix has been lodged with the Clerk of this Court.

tire portfolio purchase for Eden Hannon, take a security interest in the equipment and leases purchased, and agree to look only to that security in the event of a default. Pet. App. 4a-5a. Eden Hannon makes a profit by charging the investor a certain percentage over the price of the portfolio. *Id.* at 5a. In effect, Eden Hannon makes money by selling its expertise in valuing portfolios. *Id.*

Obviously, before a lender will undertake such nonrecourse financing, it will want to be fully informed about Eden Hannon's economic assessment of, and bidding terms for, each portfolio. A. 150. Before revealing its bidding strategy and its economic assessment of a particular portfolio based on the Eden Hannon computer model, Eden Hannon requires each of its lenders to sign a Nondisclosure and Noncircumvention Agreement. In return for Eden Hannon's disclosure of its confidential information regarding its portfolio bids, the lender agrees not to disclose that information to other parties and not to bid directly against Eden Hannon in the PAS program. Throughout its participation in the PAS Program, Eden Hannon has not dealt with any lender that has refused to sign such an agreement. As the court of appeals recognized, "[g]iven that [Eden Hannon's] value is in its knowledge, it must guard that knowledge jealously." Pet. App. 5a.

B. Sumitomo's Solicitation of Eden Hannon

Sumitomo was established in New York in 1987 as a wholly-owned subsidiary of its parent bank in Tokyo. A. 290. As a new concern, it was eager for business and embarked on a business development program to expand its lending activities into the area of lease receivables financing. A. 294, A. 298. In particular, during early 1988 Sumitomo developed an interest in making loans to bidders in the Xerox PAS Program. A. 297-98. As Sumitomo's former executive vice president testified, "I was hungry to, very interested in doing some business

with Eden Hannon and with as many companies or intermediaries as we could establish relationships with." A. 298; *see also* A. 879-80 (PX2).

When Sumitomo learned that Eden Hannon had won the Xerox PAS portfolio offered in June 1988, it solicited Eden Hannon as a loan customer. A Sumitomo officer, Ragheed Shanti, telephoned Eden Hannon and expressed interest in loaning money to Eden Hannon for the June 1988 portfolio or other portfolios on which Eden Hannon might bid. Pet. App. 5a.

In response to Mr. Shanti's call, two representatives of Eden Hannon, Breck Montague and Michael McKinney, agreed to meet with Sumitomo as part of a previously scheduled business trip to New York. A. 246. At the meeting, Mr. Shanti requested information about Eden Hannon's winning bid for the June portfolio, but Eden Hannon refused to provide any such information until Sumitomo signed Eden Hannon's Nondisclosure and Noncircumvention Agreement. Pet. App. 5a-6a.

Before leaving Mr. Shanti's office, the Eden Hannon representatives arranged for a copy of the agreement to be sent to Sumitomo by fax. A. 251. Thereafter, while Montague and McKinney were returning to Virginia, Mr. Shanti telephoned Eden Hannon's offices and asked another Eden Hannon employee, Kathy Burley, to send him a copy of Eden Hannon's June 1988 purchase agreement with Xerox. Ms. Burley explained that she could not provide the document until she had received a signed copy of the Nondisclosure and Noncircumvention Agreement. A. 329. Mr. Shanti encouraged Ms. Burley to send the Xerox purchase agreement anyway, falsely saying that Mr. Montague had approved it. Ms. Burley refused to comply with the request. A. 329-30.

The next day, Mr. Shanti attempted to delete the noncircumvention clause from the Eden Hannon agreement that had been sent to him by fax. Instead of promising that Sumitomo would not independently pursue lease transactions with Xerox in the PAS Program, Mr. Shanti

proposed that Sumitomo merely agree to notify Eden Hannon if Sumitomo decided to pursue such transactions. Pet. App. 6a. Eden Hannon refused to accept the "wat-er[ed] down" amendment. *Id.* Mr. Shanti made further requests for information about Eden Hannon's participation in the PAS Program and Eden Hannon's economic model, but Eden Hannon refused to provide any such information without a signed copy of the Nondisclosure and Noncircumvention Agreement. A. 260.

C. The Nondisclosure and Noncircumvention Agreement

Eventually, Sumitomo executed the Nondisclosure and Noncircumvention Agreement in the form originally proposed by Eden Hannon. Pet. App. 6a. Mr. Shanti signed the agreement on behalf of Sumitomo at the beginning of a meeting held in Eden Hannon's offices on July 14, 1988. A. 149, A. 260, A. 887-88.

The Nondisclosure and Noncircumvention Agreement contained four key provisions. First, Sumitomo acknowledged that, to further the business relationship between the parties, it was necessary for Eden Hannon to supply Sumitomo with sensitive and confidential information regarding Eden Hannon's participation in the PAS Program. Second, Sumitomo agreed not to make any unauthorized *disclosure* of the confidential information provided by Eden Hannon. Third, Sumitomo agreed not to permit any unauthorized *use* of Eden Hannon's confidential information. Finally, Sumitomo agreed (in Paragraph 6) not to bid against Eden Hannon in the PAS Program:

> Sumitomo and/or its affiliates agree not to independently pursue lease transactions with the Xerox Corporation relating to its Partnership Asset Strategy Program for a period equal to the term of the Purchase Agreement.

Sumitomo's Executive Vice President, who authorized the bank's signing of the Nondisclosure and Noncircumvention Agreement, admitted that Paragraph 6 prohibited

Sumitomo from "directly bidding against Eden Hannon" for any Xerox PAS portfolio. A. 313.

D. Eden Hannon's Disclosures to Sumitomo

After the agreement was signed, Eden Hannon disclosed a great amount of confidential bidding information to Sumitomo, including information about the June 1988 bid, how the bid had been prepared, Eden Hannon's bidding strategy, past portfolio performance in comparison to bid price, Eden Hannon's economic model, and the language used in each element of the successful June bid. Pet. App. 6a. In addition to this written material, Eden Hannon also gave Mr. Shanti an extensive oral presentation, during which Mr. Shanti asked questions about virtually every component of the Eden Hannon economic model. *Id.*; *see also* A. 337-39.

E. Sumitomo's Double-Cross of Eden Hannon

After acquiring Eden Hannon's confidential information about the PAS Program, Sumitomo did not in fact lend any money to Eden Hannon. Sumitomo's proposed interest rate was higher than Eden Hannon was willing to consider. Pet. App. 6a-7a. Eden Hannon informed Sumitomo that its proposed interest rate was higher than Eden Hannon had paid in the past, but Sumitomo did not improve its proposal. A. 264.

As the court of appeals dryly observed, "[t]his did not prevent Sumitomo from participating in the bidding for the December portfolio, however." Pet. App. 7a. In direct violation of its written promise not to independently pursue lease transactions in the PAS Program, Sumitomo immediately undertook to compete directly with Eden Hannon for the quarterly Xerox portfolios. In the court of appeals' words, "[w]ell before the December bid, Sumitomo documents indicated that it was interested in cutting out the middle-man leasing companies and bidding directly on portfolios." *Id.*

Only four days after receiving a detailed briefing on Eden Hannon's economic model, Mr. Shanti met with

Gerald Sherman, a former employee of one of Eden Hannon's competitors. They discussed a possible transaction that would give Sumitomo "a direct contact with Xerox." As Mr. Shanti explained in his report of the meeting with Mr. Sherman, Sumitomo "will acquire the equipments with the assigned leases, and will act as a leasing company, similar to . . . Eden Hannon." A. 1449 (PX25). A mere month and a half after signing the Nondisclosure and Noncircumvention Agreement, and only a few days after learning about Eden Hannon's confidential bidding strategy, Sumitomo was already plotting a direct bid to Xerox.

Sumitomo's motive for breaking its agreement with Eden Hannon was simple. Sumitomo saw the potential for "huge profit" if it could eliminate leasing companies like Eden Hannon and deal with Xerox directly. Pet. App. 7a. As Mr. Shanti reported to one of his superiors in Japan in September 1988 (A. 1424 (PX23)):

> Since all the bidders are leasing companies, our Cost of Funds are much cheaper and recognizing the tax shelter value, [Sumitomo] can easily under bid all the bidders and still recognize a huge profit.

Of course, Sumitomo never told Eden Hannon that Sumitomo was going to switch roles and become Eden Hannon's antagonist and competitor. On the contrary, Sumitomo met secretly with Xerox on at least two occasions during the fall of 1988, and Sumitomo took pains to ensure that no word of these meetings filtered back to Eden Hannon or any other potential bidder.

For example, in an internal memorandum reporting on his visit to Xerox in October 1988, Mr. Shanti stated (Pet. App. 7a; emphasis added):

> We were invited to Xerox, up in Rochester, to discuss the equipments Xerox wants [Sumitomo] to bid on next December. This is the first time Xerox invites an international bank to participate in the competitive bidding process to finance Xerox's equipments on leases. . . .

> *We want to stress the importance of keeping this information confidential, as no other party knows the role [Sumitomo] is playing.*

In a later confidential internal report to other bank officers, Mr. Shanti "crowed about the financial advantages that a bank would have in competing directly with leasing companies for portfolios." Pet. App. 7a-8a. Mr. Shanti wrote that "with our hard selling to Xerox, we showed the benefits of: (i) Xerox will eliminate the intermediaries, leasing companies, hence will cut down its costs and save time and effort. . . ." A. 1402 (PX21). In the same memorandum, Mr. Shanti expressly suggested that Sumitomo might want to pursue the Xerox lease transactions through "*a Shell company to avoid having damage to the relationship with . . . Eden Hannon.*" *Id.* at A. 1403, quoted at Pet. App. 8a (emphasis added).

Before Sumitomo could submit its bid on the December 1988 portfolio, it needed to obtain the approval of its parent bank in Tokyo. A. 291-92, A. 710-11. To obtain that approval, Mr. Shanti prepared a detailed analysis of the proposed transaction and analyzed the competition. A. 1311-73 (PX16). He specifically estimated the interest rate bids that Sumitomo's competitors, including Eden Hannon, would make on the December 1988 portfolio (A. 1315), and he recommended putting Sumitomo's bid below all of them, including Eden Hannon's.

Mr. Shanti's superior in Tokyo, Koji Ono, was curious about how Mr. Shanti learned about the bids to be made by Sumitomo's competitors. In his reply to Mr. Shanti's analysis, Mr. Ono asked Mr. Shanti how he had "intercepted" the bid prices of the other bidders. A. 1379 (PX18A). Mr. Shanti's answer underscored Sumitomo's duplicity. Mr. Shanti admitted to his superiors that he was able to estimate Eden Hanon's bid as a result of his discussions with Eden Hannon. Pet. App. 8a; A. 1383 (PX19) ("We get the information . . . from talking to Eden Hannon"). Sumitomo's parent bank approved the proposed bid for the December 1988 portfolio, and Sumi-

tomo submitted its bid on December 6, 1988 (A. 1307-09 (PX14)), in direct competition with the Eden Hannon bid of one day earlier. A. 1301-04 (PX10).

F. The District Court's Decision

When it learned of Sumitomo's deceit, Eden Hannon filed this diversity action in the United States District Court for the Eastern District of Virginia. The complaint stated claims for breach of contract, misappropriation of trade secrets, and breach of fiduciary duty. Sumitomo immediately embarked on the litigation strategy that it has followed throughout this case: It sought to take advantage of its superior financial resources by employing every conceivable tactic to deny the facts, delay the day of reckoning, and impose the maximum possible litigation burden and expense on Eden Hannon. The present petition is merely one of the more recent manifestations of this approach.

In the district court, Sumitomo answered and counterclaimed, alleging two antitrust counterclaims—monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2—and a claim for alleged tortious interference with prospective business relations. A. 67-79. The sole basis for Sumitomo's counterclaims was the allegation that Eden Hannon's lawsuit was a "sham," a spurious action brought merely as a pretense to discourage Sumitomo from participating in the PAS Program.

With respect to Eden Hannon's claims, Sumitomo denied that it had misused Eden Hannon's confidential information, denied that it had entered into any fiduciary relationship with Eden Hannon, and even denied that it had "independently pursue[d]" the December 1988 portfolio. Sumitomo's theory—which the bank is still trying to sell to this Court (*see* Pet. 4), despite its blunt rejection by the district court and the court of appeals—was that Sumitomo did not bid *directly* against Eden Hannon, but rather that it acted through an intermediary, an entity called Oasis Financial Corporation. Oasis

was a "one-man company" formed by Gerry Sherman, the same person who had initially helped Sumitomo make "direct contact" with Xerox. A. 136-38. The district court had little difficulty in disposing of Sumitomo's argument (*see* Pet. App. 31a), just as it had little difficulty in granting Eden Hannon's motions for a directed verdict and for summary judgment on Sumitomo's baseless counterclaims. *See* A. 635-37.

Although Sumitomo's bid was typed on Oasis stationery and signed by Gerry Sherman, the bid letter itself stated that it was a "proposal for a direct purchase by Sumitomo Trust & Banking Co. (U.S.A.), or one of its subsidiaries, or a special purpose company, of up to $40,000,000 in Model 1090 and 1065 copier/duplicators." Pet. App. 8a; A. 1308 (PX14). Sumitomo provided no financing to Oasis; rather, Sumitomo financed the deal directly and played the dual role of lender and leasing company. When Xerox awarded the portfolio to Sumitomo, it was Sumitomo, not Oasis, that entered into the purchase agreement with Xerox, and it was Sumitomo, not Oasis, that took title to the copying machines.

Mr. Sherman acted merely as Sumitomo's agent. In a letter to Sumitomo (not on Oasis stationery), Mr. Sherman demanded a fee for "introducing" the Xerox opportunity to Sumitomo and for expediting the successful conclusion of the deal. Pet. App. 8a. Sumitomo's own officer admitted that Sumitomo retained Mr. Sherman to help Sumitomo bid to Xerox (A. 724), and Mr. Sherman received his six-figure fee directly from Sumitomo (A. 697-98).

Moreover, as several earlier memoranda by Mr. Shanti had stressed, the very purpose of Sumitomo's efforts throughout the fall of 1988 was to deal directly with Xerox, to eliminate the middleman leasing companies, and to earn a "huge profit" as a result. A. 1449 (PX25); A. 1415, A. 1424 (PX23); A. 1402 (PX21); A. 1399 (PX20); A. 1343-44, A. 1370, A. 1374 (PX16).

The district court concluded that Sumitomo's argument about why its conduct did not breach the noncircumvention clause "just defies logic and common sense and I think defies the law." Pet. App. 31a. The court found that "the evidence is clear that the defendant bank did in fact buy this equipment in its own name and entered into this transaction with Xerox which it agreed not to do." *Id.*

Earlier, at the close of Eden Hannon's case-in-chief, the district court ruled that Eden Hannon had presented a prima facie case of liability on all three counts of the complaint. Pet. App. 26a-27a. Specifically, with respect to the misappropriation of trade secrets count, the court found that Eden Hannon had presented "substantial evidence" (A. 636) and that "there has been sufficient evidence put on to go forward that [Sumitomo] did take and use certain trade secrets" (Pet. App. 27a). Nonetheless, the district court directed a verdict for Sumitomo on all of Eden Hannon's claims for compensatory damages and allowed the case to proceed solely on the basis of equitable relief. Pet. App. 26a-28a. The court stated that "there has been no showing of . . . monetary damage to [Eden Hannon]." *Id.* at 26a.

The evidence at trial had shown that Xerox ranked Sumitomo's bid first and Eden Hannon's bid third, and that the terms of the bids were very close. A. 342-46. The bid that Xerox had ranked second (and that would have been ranked first had Sumitomo not intruded into the December competition) was necessarily even closer to Eden Hannon's bid. A Xerox representative testified that Xerox does not always award the PAS Program portfolios to the first-ranked bidder. A. 384.

The district court incorrectly assumed that, to recover damages, Eden Hannon was required to show that in the absence of Sumitomo's unlawful bid Eden Hannon *would have* won the disputed contract. Pet. App. 26a. Because of Sumitomo's misconduct, however, it is impossible for anyone to know for certain what would have happened

without Sumitomo's participation. At minimum, the Xerox testimony showed that Eden Hannon would have been in the running for the contract if Sumitomo had not bid. Ignoring these points, the court rejected Eden Hannon's damage claims, dismissed the jury, and allowed all three counts of the complaint to go forward for equitable relief only. *Id.* at 26a-28a.

At the end of trial, the district court found no misappropriation of trade secrets. Pet. App. 31a. The court inexplicably and erroneously announced that it had already dismissed the breach of fiduciary count, even though in fact the court had expressly ruled that the count could go forward as to equitable relief. Pet. App. 32a; *compare id.* at 27a. Finally, with respect to the breach of contract count, the court awarded only an injunction against future breaches. *Id.* at 33a-34a. The court awarded no remedy whatsoever for Sumitomo's past misconduct, and simply allowed Sumitomo to retain its very substantial ill-gotten gains. In the court's view, a remedy for unjust enrichment was available only under the misappropriation of trade secrets count (*id.* at 32a):

> The unjust enrichment theories only go with the misappropriation of the trade secrets, as I view this case, and I would not award any damages. By virtue of breach of contract I do feel that you are entitled to injunctive relief to see that that doesn't happen again. As I have already ruled, you have failed to prove any damage as a result of this original breach to go forward with. I think you are entitled to the relief to see that this does not happen again, but nothing beyond that.

G. The Court of Appeals' Decision

Eden Hannon appealed, raising two principal arguments. Eden Hannon contended first that, in light of the nature of the Nondisclosure and Noncircumvention Agreement and the role of that agreement in the relationship between the parties, and in light of the flagrant breach of the agreement by Sumitomo, the district court

erred as a matter of law in failing to order Sumitomo to disgorge its profits, and in concluding that such a remedy is available only for actual misappropriation of trade secrets. Eden Hannon also argued that the district court erred in ruling that the evidence was insufficient for the jury to find that Eden Hannon sustained actual damages from Sumitomo's wrongful conduct. In light of its disposition of the case, the court of appeals found it unnecessary to address this second argument. Pet. App. 9a.

Sumitomo cross-appealed. It continued brazenly to insist that it had done nothing wrong. Sumitomo affirmatively *invited* the court of appeals to review the evidence, and it urged the court to overturn the district court's finding that the bank had breached the Nondisclosure and Noncircumvention Agreement. Opening Br. for Sumitomo 19-23; Reply Br. 1-5. Sumitomo also asked the court of appeals to review and reverse the district court's holding that Eden Hannon's lawsuit was not a "sham." Opening Br. 35-45; Reply Br. 8-15.

The problem for Sumitomo was that when the court of appeals reviewed the matter, it found that Sumitomo's distorted view of the facts was just "not true." Pet. App. 7a. At oral argument, when counsel for Sumitomo was confronted with the mountain of inculpatory evidence from Sumitomo's own files, counsel finally acknowledged that Sumitomo's position is that the documents simply do not mean what they say. The court of appeals agreed with the district court that Sumitomo's position " 'defies logic and common sense.' " *Id.* at 9a. In the court's words, "[t]o us, and to the district court, it is clear that Oasis was merely a stalking horse for Sumitomo, and that Sumitomo was the direct bidder for the December portfolio." *Id.* at 7a. The court sustained the district court's finding that Sumitomo had breached its agreement with Eden Hannon. *Id.* at 9a.

The court then turned to the question of appropriate relief. It held that Eden Hannon is entitled not only to the injunction awarded by the district court but also

to "a constructive trust on Sumitomo's illegally gotten gains." Pet. App. 9a. In explaining its decision, the court devoted considerable attention to the role that the Nondisclosure and Noncircumvention Agreement played in the parties' relationship. *Id.* at 9a-16a. Specifically, the court analogized the noncircumvention aspect of the agreement to noncompetition agreements in the employment law area (*id.* at 10a-15a), and it ruled that the agreement was reasonable under the standards established by Virginia law (*id.* at 15a-16a).

The court recognized that Eden Hannon, like an employer that entrusts trade secrets to its employees, could not afford to rely exclusively on a prohibition against unauthorized disclosure or use of its confidential information. This is so because, among other things, (i) unlawful use of a trade secret is difficult to prove; (ii) an unlawful user "tends to get 'one free bite' at the trade secret;" (iii) policing of unlawful use is difficult; and (iv) avoiding improper use can be difficult, even without malicious intent by the wrongdoer. *Id.* at 12a-13a. Merely prohibiting Sumitomo from using Eden Hannon's confidential information, the court said, "would have become an unenforceable honor system." *Id.* at 14a.

That is why Eden Hannon rejected Mr. Shanti's effort to amend the agreement and insisted that the noncircumvention clause remain unchanged. With that clause in place, the court said, Eden Hannon "could protect its information by merely showing that an investor was competing contrary to the agreement, without having to prove that it was actually using [Eden Hannon's] confidential information." Pet. App. 14a. The court remarked that if such provisions were not enforced, the incentive to engage in the creation of special knowledge would be reduced, because "free riders" would be able to capture such information at little or no cost and then use it in competition with the creator. *Id.* at 11a.

Recognizing that Virginia courts have "adopted a policy of great flexibility in fashioning appropriate remedies

to address the violation of noncompetition agreements" (Pet. App. 16a-17a), the court of appeals held that the district court erred when it ruled that an unjust enrichment remedy could be awarded only on the misappropriation of trade secrets count. The court noted the difficulty of determining the extent of Eden Hannon's loss (*id.* at 18a), and it concluded that a constructive trust over Sumitomo's profits is appropriate (*id.* at 17a). The court explained that "a constructive trust will serve a two-fold remedial interest; it will force the transgressor to forfeit the illegally-gotten gains, and provide compensation for [Eden Hannon's] injury." *Id.* The court remanded the case to the district court with instructions to determine Sumitomo's profits and award them to Eden Hannon. *Id.* at 19a.[2]

Sumitomo petitioned for rehearing and suggested rehearing en banc. In its petition, Sumitomo contended for the first time that the court of appeals should certify to the Supreme Court of Virginia the question whether a constructive trust should be imposed on the facts of this case. The court of appeals denied the petition for rehearing. No member of the court called for a vote on the suggestion for rehearing en banc. Pet. App. 35a-36a. Sumitomo moved to stay the court of appeals' mandate. The court denied that motion as well.[3]

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[2] Having affirmed the district court's injunction and having adopted the constructive trust remedy as well, the court of appeals wasted little time in rejecting Sumitomo's frivolous appeal from the dismissal of its antitrust counterclaims. Pet. App. 18a-19a. Like the district court, the court of appeals concluded that Eden Hannon's successful lawsuit could not possibly be characterized as a "sham." *Id.* at 19a. Sumitomo has not pursued the point in this Court.

[3] On remand, the district court conducted an evidentiary hearing to determine the profits that Sumitomo must disgorge to Eden Hannon. The hearing was held on February 14, 1991, and post-hearing briefs are due on March 15, 1991.

ARGUMENT

This is a diversity action under Virginia law for breach of the Nondisclosure and Noncircumvention Agreement. The district court erroneously ruled that under Virginia law an unjust enrichment remedy is not available for such a breach. The court of appeals corrected the district court's error, properly holding that Virginia law confers broad authority to award such equitable remedies as are appropriate to the facts and circumstances of each particular case. The court of appeals' decision thus turns on Virginia law and involves no important or controversial federal question. There is no conflict among the circuits on any of the issues Sumitomo seeks to present, and no conflict with any decision of this Court.

Moreover, this case does not in fact raise any of the questions for which the petition seeks review. The court of appeals did not disturb any discretionary remedial decision by the district court, it did not set aside any finding of fact by the district court, and it did not decide any novel or uncharted issue of Virginia law. Like Sumitomo's presentation in the court of appeals, the petition is based on a series of misstatements, omissions, or half-truths that seek to minimize Sumitomo's wrongdoing and convey an inaccurate impression of the decision below.

In fact, the court of appeals' decision is correct; any other result would have condoned Sumitomo's treachery and permitted Sumitomo to retain the fruits of its misconduct. The court of appeals rightly concluded that enforcement of provisions like the noncircumvention clause is essential to encourage the continued creation and proper use of new knowledge. The court recognized that only by depriving Sumitomo of its unlawful profits could it establish that agreements like the one at issue here may not be violated with impunity. Review by this Court is not warranted.

I. THE COURT OF APPEALS CORRECTLY REFUSED TO FOLLOW THE DISTRICT COURT'S ERRONEOUS HOLDING THAT IT COULD AWARD AN UNJUST ENRICHMENT REMEDY ONLY FOR MISAPPROPRIATION OF TRADE SECRETS

Sumitomo's entire challenge to the equitable relief awarded by the court of appeals proceeds on a false premise: Contrary to Sumitomo's apparent view, the district court did not make any discretionary ruling regarding Eden Hannon's entitlement to a constructive trust. Rather, as Sumitomo itself acknowledges toward the beginning of its petition (Pet. 4-5), the district court held that such a remedy "only go[es] with the misappropriation of the trade secrets." Pet. App. 32a. The court thought, as Sumitomo said in its petition for rehearing in the court of appeals (at 3), that "such a remedy would lie only if Sumitomo had used [Eden Hannon's] confidential business information."

This case therefore simply does not raise the first question presented in the petition. The district court did not exercise any discretion in refusing to award an unjust enrichment remedy. Instead, it concluded that any such remedy was foreclosed as a matter of law. The court of appeals reviewed the district court's decision as the legal ruling that it was and held that under Virginia law a constructive trust may be imposed to prevent a party who has breached a noncompetition or noncircumvention agreement from retaining its wrongfully obtained profits. There is nothing the slightest bit inappropriate or unusual about the procedure followed by the court of appeals or the result it reached.[4]

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[4] The petition is mystifyingly schizophrenic on the question whether Eden Hannon requested a constructive trust remedy in the courts below. At pages 2 and 26 of the petition, Sumitomo asserts, without any citation to the record, that Eden Hannon never sought such a remedy. On page 4, however, Sumitomo admits that "[t]he district court was expressly asked to award respondent a constructive trust on petitioner's profits . . . ." The fact is that Eden Hannon requested the remedy, from the very outset of the case, on each count

Sumitomo's contention that the district court's legal error should have been reviewed under an "abuse of discretion" standard is misguided and provides no basis for review here. In the first place, Sumitomo never made this argument in the court of appeals. Neither in the opening brief nor in its reply brief nor in its petition for rehearing did Sumitomo argue that the district court's ruling about the unavailability of a constructive trust remedy was entitled to some deferential standard of review. On the contrary, Sumitomo accepted Eden Hannon's description of the applicable standard of review, a description that was plainly stated in a separate section of Eden Hannon's opening brief, in compliance with the court of appeals' Local Rule 28(b). The brief stated (at 4):

> Both issues presented by appellant Eden Hannon are questions of law. This Court should review the district court's decision on a *de novo* basis. No deference to the district court's ruling is warranted.

Sumitomo did not disagree. Under the court of appeals' local rule, if an appellee disagrees with the standard of review set forth by appellant, the appellee "must so state in a corresponding separate section of appellee's brief." Sumitomo did not do so. Furthermore, in seeking rehearing in the court below, Sumitomo attacked the panel's decision as an incorrect ruling on Virginia law, and it attempted to rehabilitate the district court's decision by arguing that Virginia law compelled the denial of a constructive trust. Having failed to raise any standard of review issue below, Sumitomo should not be permitted to pursue the point for the first time here.

In any event, the abuse of discretion standard now advocated by Sumitomo is inapplicable, given the nature of the district court's ruling. The district court's refusal to award an unjust enrichment remedy was based on an

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in its complaint (A. 25, A. 27, A. 29-30), and it repeated the request in the court of appeals. Br. for Appellant 37-41.

erroneous view of the law. That kind of decision is not entitled to any deference in the court of appeals.

This Court's decision in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), illustrates the point. *Franks* was a Title VII class action in which plaintiffs who were denied employment because of racial discrimination requested several forms of equitable relief. The district court declined to award one of the requested equitable remedies, seniority status, to the unnamed class members, on the ground that they had not filed the allegedly necessary administrative charges, and on the ground that the claims improperly presupposed a vacancy, adequate qualifications, and adequate performance for each class member. *Id.* at 771-72. The court of appeals affirmed, holding that the requested relief was barred by the statute. *Id.* at 757.

This Court reversed. The Court expressly rejected the employer's argument that the district court's decision could be justified as "an exercise of equitable discretion . . . ." 424 U.S. at 770. The record showed that the district court had acted on legal grounds and had not exercised any discretion in declining to award seniority status. In these circumstances, the Court gave no deference to the ruling of the district court. *See also Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 758 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1112 (1990) (reversing grant of equitable relief on ground that federal law preempted state law on which district court had relied); *United Food & Commercial Workers v. Marval Poultry Co.*, 876 F.2d 346 (4th Cir. 1989) (reversing denial of equitable relief and ordering award of such relief on ground that district court applied incorrect legal standard in deciding whether employer's challenges to arbitration awards were "without justification"); *Pratte v. NLRB*, 683 F.2d 1038 (7th Cir. 1982) (reversing grant of equitable relief, after *de novo* review, on ground that district court erred as matter of law in finding equitable estoppel against government).

When a district court has made an error of law in refusing a particular form of equitable relief, courts of appeals routinely reverse and direct that the relief be granted, where the record shows that the relief is appropriate. *See, e.g., Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280-81 (8th Cir. 1983) (reversing denial of reinstatement remedy in age discrimination case and remanding with instructions to grant such relief); *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (reversing denial of pension benefit remedy in age discrimination case and remanding with instructions to award such benefits); *SEC v. Levine*, 881 F.2d 1165, 1177, 1183 (2d Cir. 1989) (reversing denial of priority for IRS tax lien against assets of securities law violator, and remanding for determination of precise amount of lien); *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634, 637-38 (4th Cir. 1987) (reversing district court's apportionment of liability, and reapportioning liability based on facts in record).

Sumitomo's reliance on *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973), is misplaced. Those cases stand for the unexceptional proposition that where a district court *properly* interprets its power to grant or deny equitable relief, the district court's exercise of that power will be reviewed only for abuse of discretion. The decisions provide no comfort for Sumitomo; rather, they underscore the fundamental point that before a district court's equitable decree is entitled to deferential review, it must be based on sound legal principles.

Here, the court of appeals correctly recognized that the district court's ruling about the limited availability of an unjust enrichment remedy was wrong as a matter of Virginia law. As the court of appeals observed, the Supreme Court of Virginia has held in no uncertain terms that, where equitable enforcement is appropriate, a court may " 'adapt[] its relief and mold[] its decrees to satisfy the requirements of the case.' " *Roanoke En-*

gineering Sales Co. v. Rosenbaum, 233 Va. 548, 290 S.E.2d 882, 886 (1982), *quoting First National Exchange Bank v. Hughson*, 194 Va. 736, 74 S.E.2d 797, 809 (1953) (Buchanan, J., concurring). A Virginia equity court "will administer such relief as the exigencies of the case demand," and it will not be deterred in fashioning appropriate relief by "[t]he absence of precedents, or novelty in incident . . . ." *Id.* In fact, the Supreme Court of Virginia has said that, under Virginia law, there is "no limit" to the "variety and application" of equitable remedies. 290 S.E.2d at 886. " '[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.' " *Id.*

The central theme of Virginia cases discussing the constructive trust remedy is that "equity regards and treats as done what in good conscience ought to be done," and that the "forms and varieties" of constructive trusts are "practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice." *Patterson's Executors v. Patterson*, 144 Va. 113, 131 S.E. 217, 220 (1926), *quoted in Sundin v. Klein*, 221 Va. 232, 269 S.E.2d 787, 792 (1980), *cert. denied*, 452 U.S. 911 (1982). *Leonard v. Counts*, 221 Va. 582, 272 S.E.2d 190, 195 (1980), on which Sumitomo relies, explains that "[c]onstructive trusts are those which the law creates, independently of the intention of the parties, to prevent fraud or injustice." Among the kinds of situations in which a constructive trust will be used are cases in which " 'property has been acquired by a fraud or improper means.' " *Id.*, *quoting* 1 *Minor on Real Property* § 462, at 616 (2d ed. Ribble 1928). *See also Greenspan v. Osheroff*, 232 Va. 388, 351 S.E.2d 28, 36 (1986) (a constructive trust "may arise from breach of a fiduciary duty as well as from actual fraud or unconscionable conduct amounting to constructive fraud"); *Campbell v. Corpening*, 230 Va. 45, 334 S.E.2d 589, 592 (1985) (quoting *Leonard v. Counts*, *supra*, and stating that a constructive trust may arise

not only when property has been acquired by improper means, but whenever it is contrary to the principles of equity for property to be retained by the person who acquired it).

All of these Virginia cases thus support not only the flexibility of the constructive trust remedy under Virginia law, but the propriety of its use to correct "unconscionable conduct," or acquisitions of property through "improper means." These phrases are apt descriptions of Sumitomo's wrongdoing in this case. Sumitomo's effort to distinguish cases like *Sundin v. Klein* on the ground that they involve "highly unusual circumstances" (*see* Pet. 8 n.8) looks in precisely the wrong direction: It fails to appreciate the significance of the widely disparate factual situations in which the constructive trust remedy has been applied under Virginia law. The very adaptability of the remedy supports the court of appeals' decision to apply it here.

The court of appeals' reasoning in the present case was similar to that of this Court in *Snepp v. United States*, 444 U.S. 507 (1980). In *Snepp*, this Court held that a constructive trust was appropriate in a particular set of circumstances, even though no prior decision had endorsed the remedy in a similar context. Frank Snepp, a former CIA agent, wrote a book about his experiences in Vietnam while employed by the CIA. In violation of his employment agreement, Snepp published his book, *Decent Interval*, without submitting the book for prepublication review by the CIA. This Court approved imposition of a constructive trust on all of the profits on the book, even though there was no showing and no allegation that Snepp had breached his contractual duty not to reveal classified information. The breach of the prepublication review requirement was enough to justify the remedy, even though the relevant section of the Court's opinion did not cite a single case in support of the remedy's use in such circumstances.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT SUMITOMO BREACHED THE NONDISCLOSURE AND NONCIRCUMVENTION AGREEMENT, AFTER A REVIEW OF THE RECORD INVITED BY SUMITOMO, AND WITHOUT DISTURBING A SINGLE FINDING OF THE DISTRICT COURT

Sumitomo is simply wrong in suggesting that the court of appeals set aside the district court's findings of fact. The court did no such thing. Indeed, the court left all of the district court's findings undisturbed, even though it had substantial doubts about the correctness of the district court's conclusion that Sumitomo did not misuse Eden Hannon's trade secrets. Pet. App. 8a-9a. Sumitomo's assertion of error under Fed. R. Civ. P. 52(a) is particularly curious in light of Sumitomo's own acknowledgment that the court of appeals did not upset any of the district court's findings. Pet. 5 ("Nor did [the court] overturn any of the district court's findings").

Sumitomo's elaborate demonstration that Rule 52(a) applies to *all* cases in the federal courts (Pet. 17), and its reliance on cases such as *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), are superfluous. No one in this case—least of all, the court of appeals—has even hinted that Rule 52(a) is inapplicable.

Moreover, Rule 52(a) does *not* require an appellate court to respect a trial court's erroneous conclusion of law. *See, e.g.*, 5A J. Moore, W. Taggert, A. Vestal, & J. Wicker, *Moore's Federal Practice* ¶ 52.03[2], at 52.76 (2d ed. 1990). As this Court recently stated:

> Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. *But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact that is predicated on a misunderstanding of the governing rule of law.*

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984) (citations omitted) (emphasis added); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982) (same); *Rawl v. United States*, 778 F.2d 1009, 1014 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986) (same).

Because Sumitomo cannot identify a single finding that was overturned, it resorts to accusations that the court of appeals was somehow disloyal to the findings below or that the court erred by reviewing evidence in the record and not limiting itself to the transcript of the district court's oral ruling. Neither of these charges is accurate.

Like Sumitomo's effort to deny liability in the court of appeals, Sumitomo's claim that the court of appeals "did not give proper deference" to the district court's findings (Pet. 10-11) suffers from severe credibility problems. For instance, Sumitomo states—naturally, without citation—that the district court found that Eden Hannon "had *no chance* of winning the bid on the December 1988 Xerox transaction." *Id.* at 10 (emphasis added). That is false. The district court made no such finding. Instead, the district court found only that Eden Hannon could not prove that it *would have* won the bid in the absence of Sumitomo's wrongful conduct. Pet. App. 26a (emphasis added). There is a big difference. While it may be impossible to prove that the San Francisco 49ers *would have* won this year's Super Bowl had the New York Giants not been in the playoffs, the 49ers surely would have had a *chance* to win under those circumstances.

Sumitomo next criticizes the court of appeals for expressing doubt about the correctness of the district court's finding that Sumitomo did not use Eden Hannon's confidential information. Pet. 11. But nothing in Rule 52(a) prohibits a court of appeals from expressing doubt. A court's full description of its reasoning should be encouraged, not squelched. In any event, after observing that the misappropriation question was a "close call," the court of appeals declined to reverse the district court's

finding on the subject and thus displayed considerable deference to the trial judge's view. Pet. App. 8a-9a.

Sumitomo also complains that the court of appeals "speculated that Mr. Sherman did not prepare" Sumitomo's bid. Pet. 11. In Sumitomo's view, such speculation is forbidden by the district court's alleged finding that "Mr. Sherman—not petitioner—had prepared the winning bid." Pet. 10. Sumitomo's griping is unfounded. The district court did not make any finding that Mr. Sherman prepared the bid and Sumitomo did not. Mr. Sherman was Sumitomo's agent, as Sumitomo's own officer admitted. A. 724. Whatever Mr. Sherman did in connection with the December 1988 portfolio was done for and on behalf of Sumitomo. In reviewing the evidence at trial, the trial judge did say that he had listened to the testimony of Gerry Sherman, "the gentleman . . . who prepared the bid." Pet. App. 31a. But the court never said that the bid was not Sumitomo's or that Mr. Sherman's actions were not performed in his role as agent for Sumitomo. And, in any event, Sumitomo has cited no evidence that the court of appeals' allegedly prohibited "speculation" about Mr. Sherman's role affected the outcome of the case. Sumitomo would not be entitled to keep its illegal profits whether its bid was "prepared" by Mr. Sherman, Mr. Shanti, or the man in the moon. In the end, it was Sumitomo's bid, and that is what mattered.

Sumitomo next asserts that the trial judge is "in a far better position to determine whether conduct is 'wrongful' than a panel of appeals judges who review a cold record many months later." Pet. 20. Only Sumitomo's myopic view of the district court's decision could permit an observation so irrelevant to this case. Here, the trial judge *did* find that Sumitomo's conduct was wrongful—and the panel of appeals judges affirmed that finding.

Finally, Sumitomo accuses the court of appeals of a "one-sided review of the record." Pet. 9. On its cross-appeal challenging the district court's finding of liability,

Sumitomo had every incentive and opportunity to identify whatever evidence in the record Sumitomo might have thought helpful to its case, and Sumitomo in fact availed itself of that opportunity. Sumitomo's contention that it was in some way improper for the court of appeals to examine the entire record in responding to Sumitomo's cross-appeal is without merit.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY REFUSING TO CERTIFY A QUESTION TO THE SUPREME COURT OF VIRGINIA

Petitioner did not seek certification until after it lost in the court of appeals. In more than a year and a half of litigation before its petition for rehearing below, Sumitomo never so much as suggested the need for any guidance from the Supreme Court of Virginia. Its thirteenth-hour claim that such guidance is indispensable was nothing more than a desperate response to its defeat on appeal. The court of appeals correctly rejected Sumitomo's transparent effort to protract these proceedings even further and to impose still more litigation burden and expenses on Eden Hannon.

The federal courts quite properly have been unreceptive to such belated requests for certification, made only after the requesting party has received an unfavorable judicial decision. As the Eighth Circuit explained in affirming the district court's denial of a motion to certify that was not made until after the *district court* had granted summary judgment against the requesting party,

> [t]he practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision.

Perkins v. Clark Equipment Co., 823 F.2d 207, 210 (8th Cir. 1987). *See also Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) ("particularly compelling reasons

must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below"); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (same); 17A C. Wright & A. Miller, *Federal Practice and Procedure* § 4248, at 9 (1990 Supp.).

Moreover, federal courts should not certify questions to state courts except in cases where that course is clearly appropriate and efficient. Certification "entails more delay and expenses than would an ordinary decision of the state question on the merits by the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring). Ordinarily, even in situations where state law is unclear or unsettled, a federal court's function is to make an "Erie educated guess," *i.e.*, "to predict the rule that the [state] Supreme Court would probably apply were the case before it." *Putnam v. Erie City Manufacturing Co.*, 338 F.2d 911, 912 (5th Cir. 1964) (Wisdom, J.); *National Union Fire Ins. Co. v. Johnson*, 709 F. Supp. 676, 677 (E.D. Va. 1989). As the D.C. Circuit has said, certification "is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow." *Tidler*, 851 F.2d at 426. *See also Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-76 (5th Cir.), *cert. denied*, 429 U.S. 829 (1976) (same).

Perhaps the most helpful discussion of the issue is contained in *West American Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760 (E.D. Va. 1987), in which the district court declined to certify two questions of Virginia law even though the questions were dispositive" and were not resolved by controlling Virginia precedent. The court explained (*id.* at 764 (footnote omitted)):

> All certifying courts should be keenly aware . . . that certification involves an imposition on the time and resources of the Supreme Court of Virginia and an increase in the expenditure of time and resources by the parties for, if certification is ordered, they must

> submit briefs and may be requested to make oral argument. All of this means delay in disposition, increased costs to the parties, and increased costs in judicial resources. These factors strongly suggest that the discretion to certify should be cautiously exercised.

This reasoning is directly applicable here. As demonstrated above, the court of appeals had more than ample guidance from Virginia law to make a nonconjectural determination of what the Supreme Court of Virginia would say if it were asked whether the equitable remedy of a constructive trust was appropriate in this case.

The court of appeals' opinion represents the unanimous view of able and experienced judges of the circuit that includes Virginia. The panel included one former federal district judge who sat in the Western District of Virginia and another who sat in West Virginia. The court did not suffer from any lack of familiarity with Virginia law. Moreover, Sumitomo's petition for rehearing was reviewed by the full court of appeals, including two judges from Virginia, and no judge so much as called for a vote on the suggestion for rehearing en banc.

For all of these reasons, this case was and is a particularly poor choice for use of the certification procedure. Further review is not needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 11, 1991

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